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Karl Lang

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EXAMINER

WRIGHT, PATRICIA KATHRYN

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KARL LANG

Appeal 2009-011226
Application 09/765,112
Technology Center 1700

Before ADRIENE LEPIANE HANLON, DEMETRA J. MILLS, and
KAREN M. HASTINGS, *Administrative Patent Judges*.

HANLON, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

A. STATEMENT OF THE CASE

This is an appeal under 35 U.S.C. § 134 from an Examiner's decision finally rejecting claims 2-29 and 35-38, all of the pending claims. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

The subject matter on appeal is directed to an analyzer system. Claim 35, reproduced below, is illustrative.

35. An analyzer system for immersing at least two instruments into a sample and removing the instruments therefrom, comprising:

a vertical guide;

an instrument holder constrained to move along the vertical guide to selectively immerse or remove the instruments, the instrument holder *comprising a holder device with at least two apertures, each aperture arranged to receive and hold one of the at least two instruments*;

a washing device with a central opening, positioned between the instrument holder and the sample such that the central opening and the holder element are maintained in co-axial relationship as the at least two instruments pass through the central opening, the washing device comprising a jet orifice and a supply conduit for a wash fluid, communicated to the jet orifice.

Appeal Brief dated November 17, 2008 ("Br."), Claims Appendix (emphasis added).

The only rejection before us on appeal is the rejection of claims 2-29 and 35-38 under 35 U.S.C. § 103(a) as unpatentable over the combination of

Öhlin (US 3,552,212, issued January 5, 1971) and Harris (US 5,650,122, issued July 22, 1997).²

B. DISCUSSION

There is no dispute that the holder device 22 of Öhlin has one aperture (for receiving and holding probe 18) rather than “at least two apertures” as recited in claim 35. *See* Ans. 4. The dispositive issue in this appeal is whether the claimed holder device comprising “at least two apertures” would have been obvious to one of ordinary skill in the art in view of the teachings in Öhlin.³ *See* Br. 12.

The Examiner concludes that it would have been obvious to modify the holder device 22 of Öhlin to include at least two apertures as claimed “since the ordinary artisan would expect that this would increase instrument washing throughput.” Ans. 5. The Examiner also relies on *In re Harza*, 274 F.2d 669 (CCPA 1960), to establish that a holder device having “at least two apertures” as claimed would have been *per se* obvious. Ans. 5.

The apparatus disclosed in Öhlin is used to aspirate and dispense a quantity of a sample via a single probe 18, which is subsequently washed to prevent cross-contamination. *See, e.g.,* Öhlin 2:27-61. The Examiner does not explain why one of ordinary skill in the art would have used more than one probe 18 to perform the aspirating and dispensing function described in

² The Examiner withdrew the rejection of claims 2-29 and 35-38 under 35 U.S.C. § 112, first paragraph in the Advisory Action dated October 27, 2008. The Examiner withdrew the rejection of claims 2-29, 35, 37, and 38 under 35 U.S.C. § 103(a) as unpatentable over Ambers (US 4,338,280, issued July 6, 1982) in the Examiner’s Answer dated February 18, 2009 (“Ans.”), at 2.

³ The Examiner does not rely on the teachings of Harris to cure this deficiency in Öhlin.

Öhlin. Thus, on this record, there is no reason why one of ordinary skill in the art would have modified the holder device 22 of Öhlin to include a second aperture for holding a second probe.

Moreover, the Court does not look favorably on *per se* rules of obviousness. *See In re Ochiai*, 71 F.3d 1565, 1570 (Fed. Cir. 1995) (no *per se* rule of obviousness exists). Therefore, we decline to adopt the Examiner's reasoning that the claimed holder device would have been *per se* obvious in view of the holding in *In re Harza*, 274 F.2d 669 (CCPA 1960).

In sum, the Examiner has failed to establish that it would have been obvious to one of ordinary skill in the art to modify the holder device 22 of Öhlin to include a second aperture as recited in claim 35. Therefore, the § 103(a) rejection on appeal will be reversed.

D. DECISION

The decision of the Examiner is reversed.

REVERSED

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